No. 11,990

IN THE

United States Court of Appeals

For the Ninth Circuit

ESTELLA LATTA, JONES M. GRIFFIN and ALVIN CHAMBERS, et al.,
Appellants,

vs.

WESTERN INVESTMENT COMPANY, et al.,
Appellees.

APPELLANTS' REPLY BRIEF.

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FOREWORD.

We appreciate counsel for appellees directing our attention to an erroneous quotation on the middle of page 33 of appellants' opening brief commencing with the names *Duncan v. Superior Court,* 149 Cal. 98. This citation is not correct. We cannot at this time account for the insertion of this paragraph or of the same being quoted.

We most respectfully beg the pardon of the Court and of opposing counsel for this regrettable error.

STATEMENT OF THE BASIS OF ACTION.

This action is based, upon (1) the conspiracy and fraud committed by Mary Frances Sherwood-Hopkins and Moses Hopkins at the times they filed their re-

spective petitions for letters of administration, in the methods adopted by them to prevent the heirs of Mark Hopkins residing in the State of North Carolina from receiving notice of his death, knowing that if notice was given to them of the death of their brother, they would make their relationship to the deceased known to the Court in the probate proceedings; hence their failure to state in their respective petitions for letters of administration or in the purported decree of distribution the names, ages and residences of the brothers and sisters, of the deceased, other than Moses Hopkins, together with the false statements contained in letters written by Moses Hopkins to the rightful heirs residing in North Carolina in which he informed them that Mark Hopkins died and left a wife and nine children, and on another occasion he wrote them that Mark Hopkins had died and left a will leaving all his property to him (Moses Hopkins) (Paragraphs 21, 22 R. pp. 20, 21). That by reason of the failure of Mary Frances Sherwood-Hopkins and Moses Hopkins to state in their petitions for letters of administration, or in the petition for distribution, the names, ages and residences of the brothers and sisters of Mark Hopkins, other than Moses Hopkins, the estate was wrongfully distributed to Mary Frances Sherwood-Hopkins and Moses Hopkins and their seven other brothers and sisters and their descendants were prevented from receiving any portion of the estate of Mark Hopkins to which they were entitled by law.

2. That the purported decree of distribution is void upon its face.

3. That the Court exceeded its jurisdiction in appointing Moses Hopkins administrator of the estate, he having been previously convicted of an infamous crime.

4. That the deeds described in the complaint are void upon their face.

We agree with the statements contained in the first paragraph of appellees' "Statement of the Case", but not with the statement in the second paragraph. We do not agree with statements in the second paragraph of appellees' "Statement of the Case" found on page three of appellees' brief. Commencing with the word "it" in line 6 of paragraph 2, page 3, wherein it is stated:

> "It appears from the complaint itself, however, that none of the three plaintiffs are or were heirs of Mark Hopkins and that none of the persons named in Exhibit 'F' (R. 70) are or were heirs of Mark Hopkins. It is only alleged that they are descendants of brothers and sisters of Mark Hopkins, but with no allegation that they succeeded to the estate of their respective ancestors."
>
> Par. 14 of complaint, R. 6.

We call the Court's attention to the fact that appellees have misstated the facts in reference to the allegation of plaintiff's complaint.

No such statement is contained in paragraph 14 of the complaint (R. 6), on the contrary that paragraph alleges only the names of the brothers and sisters of Mark Hopkins, deceased. To the contrary, the complaint does allege (Par. 1 of Complaint, R. 3),

"That the plaintiffs, Estella Latta, Jones M. Griffin and Alvin Chambers appear herein as plaintiffs for themselves and for all other *heirs* of Mark Hopkins, similary situated whose names are set forth in Exhibit 'F' and annexed hereto and made a part hereof".

Again in Par. 20 of Complaint (R. 20), it is alleged

"That by reason of the facts as herein alleged the brothers and sisters of said Mark Hopkins, whose descendants are the plaintiffs, were deprived of their property rights, and their vested interest in the estate of said deceased Mark Hopkins", etc.

Again in Par. 33 of Complaint (R. 27), it is alleged,

"That each and every person whose name appears in said Exhibit 'F' is a legal descendant of the brothers and sisters of Mark Hopkins, that said brothers and sisters are now dead and that the persons named in said Exhibit 'F' *are the next of kin and collateral heirs of the aforesaid Mark Hopkins, deceased,* and are entitled to their distributive share of said estate."

Again in Par. 46 of Complaint (R. 34), it is alleged

"That the *heirs* of Mark Hopkins as herein alleged are the lineal descendants, and are the owners of one-fifth (1/5) interest in and to said real estate, and are tenants in common with said defendants", etc.

Again in Par. 57 of Complaint (R. 41), it is alleged,

"That by reason of the premises the plaintiffs herein, direct descendants of above named

brothers and sisters of Mark Hopkins, except Moses Hopkins, are the owners of and entitled to the possession of a seven-eights (7/8) interest in and to said stocks and bonds."

Again in Par. 71 of Complaint, Sub. Sec. A (R. 46), it is alleged

"That the plaintiffs herein and the persons similarly situated whose names are set forth in Exhibit 'F' annexed to this complaint and made a part hereof, *are the heirs of Mark Hopkins, deceased"*. (Emphasis ours.)

THE FACTS ALLEGED ARE SUFFICIENT TO STATE A CAUSE OF ACTION.

The complaint alleges (Par. 11, R. 5),

"That Mark Hopkins died intestate, * * * that said decedent left neither father nor mother nor issue surviving him."

And in Par. 26 (R. 23), it is alleged

"That the said Mary Frances Sherwood-Hopkins was never married to the late Mark Hopkins and was not his wife".

The complaint as above pointed out does allege that Mark Hopkins died intestate, that the brothers and sisters were his heirs at law, and that the plaintiffs are the legal descendants of the brothers and sisters of Mark Hopkins and that the brothers and sisters are now dead, and that plaintiffs are the next of kin and heirs of Mark Hopkins and entitled to the property described in the complaint. There is no necessity

for further or additional allegation as claimed by appellees.

There is no presumption the brothers and sisters of Mark Hopkins died testate. In cases of this character, if there was a will devising property to others, it would be a matter of defense.

Miller v. Lupo, 80 Cal. 257, 22 P. 195;

Murphy v. Crowley, 140 Cal. 141, 73 P. 820 at 822;

Wilson v. Spoudamire, 60 Cal. App. (2d) 642, 141 P. (2d) 457.

In appellants' complaint they have alleged facts which show a fiduciary relation existed between the administrator and distributees and the plaintiffs herein, therefore establishes that the order appointing Moses Hopkins administrator and the decree of distribution are void for the following reasons:

At the time letters of administration were issued in the Mark Hopkins estate, Sec. 1371 of Code of Civil Procedure quoted in appellees' brief page 20 provided that:

> "Petitions for letters of administration must be in writing signed by the applicant or his counsel, and filed with the Clerk of the Court, stating the essential facts essential to give the Court jurisdiction of the case, and when known to the applicant, he *must state the names, ages and residences of the heirs of the decedent,* and the value and character of the property. If the jurisdictional facts existed, but are not fully set forth in the petition, and are afterwards proven in the course of administration, the decree or order of

administration and subsequent proceedings are not void on account of such want of jurisdictional averments." (Emphasis ours.)

The purported decree of distribution, Exhibit "A" R. 49, shows on its face that only two persons, viz.: Mary Frances Sherwood-Hopkins, and Moses Hopkins, the administrator, had any interest in the estate and said account was settled and allowed, R. 49 and R. 145, Exhibit "A", establishes conclusively that the names, ages and residences of James Hopkins, John Hopkins, Martin Hopkins, Joseph Hopkins, brothers of the deceased, and Annie Hopkins Russell, Prudence Hopkins Russell and Rebecca Hopkins Griffin, sisters of deceased, were not stated in the petition for letters of administration or proven in the course of administration. The complaint, R. 10, 21, and 27, shows that both Mary Frances Sherwood-Hopkins and Moses Hopkins well knew the names of Mark Hopkins' brothers and sisters and their post office addresses.

This is a direct attack on the order appointing the administrator and the purported decree of distribution based on the grounds of fraud. The rule that these questions could have been raised on appeal from the order or decree is not conclusive. This was so held in *Zaremba v. Woods,* 17 Cal. App. (2d) 309, 61 P. (2d) 976 and cases here cited, where there existed a state of facts similar to those alleged in the plaintiff's complaint, in the case at bar. In that case Woods, the executor of the estate of Zaremba, stated in his petition for probate of the will, that the deceased had no heirs, except Hugo Zaremba (as in the case at bar),

who is now living and inasmuch as he is well provided for, I make no provisions for him by this, my last will.

The extrinsic fraud relied upon by the plaintiff, in that case, as committed by the executor Woods was based upon the petition filed by him for the probate of the will of Zaremba, deceased, in which the statement appeared that the deceased left no heirs. That this statement was made for the purpose of preventing the heirs of the deceased learning of the passing of Adolph Erich Zaremba, and of the fact that he had made a will in favor of Woods. The will was admitted to probate. The plaintiff did not learn of the fact of there being a will, or of its probate until more than six months had elapsed. He acquired such knowledge upon coming to California for the purpose of visiting his brother and for the first time ascertained that his brother had died on January 31, 1933. The time having elapsed for the contest of the probate of the will, referred to, the plaintiff filed his complaint in equity, based upon the alleged extrinsic fraud of Woods in concealing the fact of the deceased having relatives, it being alleged in the complaint that the statement in the petition that the deceased died without leaving relatives, was known by Woods to be false, and was fraudulently made for the purpose of concealing the fact of the death of Adolph Erich Zaremba, and of the proceedings for the probate of the will. (Similar allegations are made by the plaintiffs in this case.) R. 8 par. 18, R. 9 and 10 Sub. Par. C, R. 19, 20, 21, 22 down to Par. 24.

The Court there said:

"The omission of stating the fact of heirs in the petition filed by Dr. Woods necessarily prevented the clerk of the court from giving the notices specified in Section 328, supra, to be given.

"That an action in equity will lie just as here instituted, we need cite only one case, to-wit, Caldwell v. Taylor, 218 Cal. 471, 23 P. (2d) 758, 88 A.L.R. 1194. This case quotes at length from the case of U. S. v. Throckmorton, 98 U. S. 61, 25 L. Ed. 93. The distinction between extrinsic and intrinsic fraud is there clearly defined. The "extrinsic fraud" consists in the deception practiced by the successful party in keeping his opponent in ignorance of the proceeding. "Intrinsic fraud" is mentioned as being perjured testimony given at the trial. This case also establishes the law that where extrinsic fraud is shown to exist, the successful party may be held a trustee for the benefit of those who are entitled to receive the property of the estate. While the judgment or decree of the probate court is not set aside, the distribution of the property may be ordered made to those legally entitled to receive the same."

Zaremba v. Woods, 61 P. (2d) 976.

Appellees in their reply brief cite *Nicholson v. Leatham,* 28 Cal. App. 597, 153 Pac. 965 and quote only a portion of the Court's decision, and not the decision of the Court which held to the contrary, in support of their contention that the jurisdiction of the probate Court to administer upon the estate of a decedent is not affected by the failure to name in the petition for the appointment of an administrator

or executor, the names of the heirs, even though known to the petitioner, so long as the notices provided for by statute are given. That is not the point in issue here, the plaintiffs seek to set aside the order and decree based upon the false and fraudulent statements made in the petition for letters and in the decree of distribution and in the false representations made by Moses Hopkins to the heirs. The case of *Nicholson v. Leatham* was an action to quiet title, and is readily distinguished from the case at bar. This action is brought upon the false and fraudulent statement made in the petition for letters of Administration and the decree of distribution and to the heirs of Mark Hopkins for the purpose of preventing the heirs learning either of the death of Mark Hopkins or of the proceedings instituted by Mary Frances Sherwood-Hopkins and Moses Hopkins for the Administration of the estate of Mark Hopkins, deceased. In that case the Court said:

> "The rule (contended for by Appellees in this case) is absolute, *save and except in cases where there has been a breach of duty from a fiduciary relation on the part of those securing the probate of a will, that the acts alleged to constitute extrinsic fraud must be such as to operate to prevent the heir from appearing in the probate court and there contesting the will and exhibiting fully his case against its being admitted to probate".* (Emphasis ours.)

This case, together with the cases cited in the Court's opinion conclusively establishes, that the complaint in this action states a cause of action, cognizable in equity.

Appellees cite *Monk v. Morgan,* 49 C.A. 154, 192 Pac. 1046, in support of their above quoted contention. That case is cited by the Court in *Zaremba v. Woods,* above, and there distinguished from the facts of that case, and the case at bar.

The Court said:

> "Monk v. Morgan deals only with defective notices and false testimony given in Court. The defective notice in that case was held not to deprive the Court of jurisdiction, and the perjured testimony given upon the hearing of the case was held to be intrinsic fraud. *We find nothing in the case at bar to the effect that any of the parties had connived with heirs receiving notice."* (Emphasis ours.)

The allegations of the complaint in the case at bar, R. 18 "M", show that Mary Frances Sherwood-Hopkins and Moses Hopkins, one of the heirs who had received notice, connived with Samuel Hopkins to defraud the other heirs of the deceased of their portion of the estate.

The Court further said in *Monk v. Morgan* cited by appellees:

> The trial court has found, as we have seen, that the acts and conduct of George Morgan in relation to the sending of this remittance were undertaken with the fraudulent design on his part of concealing the fact of the death of Henrietta M. Cox and of the pending proceeding in probate for the administration of her estate from her Eastern heirs, and of thus preventing them from making their timely appearance in the probate court to contest his false and fraudulent repre-

sentations being made therein, and to claim and prove their right to receive in distribution an undivided one-half of the decedent's estate. There can be no question but that such acts and conduct on the part of the defendant herein, done with the knowledge and concurrence of his codefendant, and having the effect which they are thus found by the court to have had, would constitute extrinsic fraud within the definition of that term found in the case of Pico v. Cohn, supra, and in the long line of later decisions, most of which are above cited and which follow and restate the doctrine declared in that early case. We are therefore of the opinion that the contention of the plaintiffs in relation to the matters last above considered was sufficiently pleaded, amply proven, and correctly found by the trial court, and that the same constitutes such a sufficient showing of extrinsic fraud on the part of the defendants herein as to justify and uphold the judgment entered herein and from which this appeal has been taken.

The Judgment will therefore be affirmed.

Welch, Judge pro tem., concurs.

Waste, P. J. I concur. The defendant Morgan, as administrator of the estate of Henrietta M. Cox, deceased, occupied a trust relation towards the plaintiffs, who were entitled to share in the estate. Robbins v. Hope, 57 Cal. 497. Other than the plaintiffs, he and his sister, the defendant Louisa Arnold, were entitled to distribution to themselves of the whole of the estate. That was what they were seeking. Whatever they could withhold from the plaintiffs was so much gained to them. The action of Morgan, fully described in

> the majority opinion, was a device intended to prevent the plaintiffs from submitting their claims to the probate court for determination. It was extrinsic fraud which entitled the plaintiffs to the intervention of a court of equity to set aside the decree, or, as is being sought here, to impress the property with a trust in plaintiffs' favor. Bacon v. Bacon, 150 Cal. 483, 489, 89 Pac. 317.

Appellees also cite *Beltram v. Hynes,* 40 Cal. App. 154, 192 P. 1042, in support of their contention that failing to name the names of the heirs in the petition did not constitute extrinsic fraud, however Appellees did not quote that portion of the decision which states the exception to this rule, pointed out in that very decision and in *Zaremba v. Woods* and *Monk v. Morgan.* Appellants' complaint does allege facts which bring the case clearly within the well established exceptions in all three of the cases cited by appellees.

Last 3 lines of R. 6 and first 10 lines R. 7, R. 17, R. 10 first paragraph, R. 18, 19, 20 subsection M, and particularly to the last paragraph thereof. R. 23 Par. 25, R. 24 Par. 27, R. 26 Par. 30.

THIS COURT HAS NOT PASSED UPON ANY OF THE ISSUES HERE INVOLVED.

Appellees cite *Freeman v. Hopkins et al.,* 32 Federal (2d) 756, at page 7 of their brief. That case has no application to the facts alleged in the case at bar, in that:

1. None of the defendants in the *Freeman* case are defendants in the instant case. It is a well settled principle of law that only parties to a former action can plead res adjudicata.

2. The subject matter is different. None of the property involved in that case is involved in this case. The Court said in the *Freeman* case, page 756:

> "The object of the suit was to establish a trust in securities of great value which it was charged were the property of Mark Hopkins, at the time of his death and which are presently in possession of the defendant Banks, generally it is alleged that the securities were fraudulently concealed from the knowledge of the court in the probate proceedings by the deceased widow and his brother Moses Hopkins."

There is no obligation in the instant case as to any trust fund alleged to be held by any banks and they are not parties in this action.

At page 757 the Court said:

> "In passing it may be added that plaintiff is here claiming no interest in the real property of which the decedent was possessed and hence we are not concerned with the validity of either the agreement or deed referred to, or that part of the decree of distribution."

3. In the *Freeman* case the Court said:

> "The plaintiff failed to allege a cause of action in that it failed to allege lack of notice, extrinsic fraud, that the order directing it was erroneous or defective in any particular, that the ancestress did not appear, that such failure was due to any

act or omission on the part of the administrator or the beneficiaries."

The Court further said, at page 758:

"In the absence of extrinsic fraud of a material character, generally a decree of distribution made by a probate court having jurisdiction constitutes an adjudication in rem and is binding upon all the world. There is no question of jurisdiction."

In the case at bar, the plaintiffs are claiming an interest in real property, as well as other property, and allege facts establishing extrinsic fraud: That the order directing the distribution was defective, that the Court was without jurisdiction to distribute the property, in that, the order appointing the administrator was void by reason of the administrator having previously been convicted of an infamous crime and other reasons heretofore set out. That the ancestors of plaintiffs did not appear and that such failure was due to the fraudulent acts of the administrator. That the ancestors of plaintiffs had no knowledge of the fraud, that plaintiffs had no knowledge of the fraud until 1945, and the plaintiffs in this action ask for relief from the deed referred to in the complaint and made a part thereof.

We therefore submit that the decision in the *Freeman* case is not in any wise controlling in this case, and is not res adjudicata.

ADMINISTRATOR'S CONVICTION OF AN INFAMOUS CRIME.

Answering Appellees' Brief, page 30, in which they state that lack of capacity of administrator is not an allegation of fraud and comes too late, Appellants do not contend that this was extrinsic fraud but do contend that the Court lacked jurisdiction to appoint any person as administrator who had been convicted of an infamous crime under Section 1369, Code of Civil Procedure in effect in 1881 at the time Moses Hopkins filed his Petition for Administration and received the purported appointment and letters, which section prohibited the appointment as administrator of a person convicted of an infamous crime, and that the purported appointment was in excess of the jurisdiction of the Court and void. That in law and in fact Moses Hopkins never was an Administrator of the Estate of Mark Hopkins. We covered this question in our opening brief commencing with page 16 thereof to and including the first paragraph on page 24. The authorities cited by Appellees have no application to the fact alleged in Plaintiffs' Complaint wherein it is alleged that Moses Hopkins had been previously convicted of an infamous crime in North Carolina in 1845. (Record pages 80 and 81.)

The authorities cited by Appellants in their opening brief hold that in such a situation, viz: The appointment of a person who has previously been convicted of an infamous crime, is void; that the Court in attempting to appoint such a person exceeded its jurisdiction and that in a case where the Court granting letters of administration has exceeded its jurisdiction

the acts done by such Court and Administrator are absolutely void, irrespective of lapse of time.

The authorities cited and quoted by Appellees are cases where the Court had jurisdiction. That is recognized in Appellees' first quotation from 1 Bancroft's Probate Practice, Section 277, pp. 529, 530, where it is said:

> "It is also settled beyond controversy that if the Probate Court had jurisdiction to appoint some one representative, the fact that it erred in selecting an appointee does not make its appointment subject to collateral attack."

This quotation sustains Appellants' contention. It shows that the rule contended for by Appellees applies only *if* the Court has jurisdiction to appoint such person Administrator.

> "Probate Proceedings being purely statutory, are therefore special in their nature. The Superior Court, although a court of general jurisdiction, is circumscribed in this class of proceedings by the provisions of the statute conferring such jurisdiction, and may not competently proceed in a manner essentially different from that provided." *Texas Co. v. Bank of America,* 5 Cal. (2d) p. 35 at 39, citing *Smith v. Westerfield,* 88 Cal. 374, 379, 26 Pac. 206; *Estate of Strong,* 119 Cal. 363 at 366, 51 Pac. 1078.

Although jurisdiction over the subject matter of the estate authorized the appointment of an Administrator, yet, since various provisions of the Code of Civil Procedure provided the exclusive method for the ex-

ercise of such authority, an appointment contrary to the applicable provisions would be in excess of the Court's jurisdiction.

Texas Co. v. Bank of America, above.

To validate the void appointment of the Administrator Appellees rely upon Section 1428 C.C.P. as it read up to the time of the adoption of the Probate Code in 1931 quoted on page 33 of Appellees' Brief, viz., that

> "All acts of Executor, etc., valid until his power is revoked. All acts of an Executor or Administrator, as such, before the revocation of his letters testamentary or of administration, are as valid, to all intents and purposes, as if such executor or administrator had continued lawfully to execute the duties of his trust."

That section refers to an Executor or Administrator who has been duly appointed and qualified to act, to one the Court had jurisdiction to appoint, but not to one that by statute the Court did not have jurisdiction to appoint.

Monk v. Morgan, 49 Cal. App. 154, 159, 192 Pac. 1042;

Texas Co. v. Bank of America, 5 Cal. (2d) 35.

In *Pryor v. Downey,* 50 Cal. 388 at 398, the Supreme Court expressed the opinion that the words " 'defects of form, omissions, or errors,' as used in the Act of April 2, 1866, validating Probate sales of realty, did not embrace a want of power in the person assuming to act as administrator or, in the absence of jurisdiction in the Court which ordered the sale."

The Supreme Court of Oregon reached the same conclusion in *Browne v. Coleman,* 125 Pac. 278 at 281.

In *Caminetti v. Imperial Mut. L. Ins. Co.,* 59 Cal. App. (2d) 476 at 492, the Court said:

> "This being a special proceeding the Jurisdiction of the Court is limited by the terms and conditions of the statute under which the proceeding is instituted."

The *Estate of Heywood,* 154 Cal. 312, 97 Pac. 825, relating to presumptions, has no application to this cause of action. Appellants are not relying upon any presumption to establish the record of the conviction of Moses Hopkins of the crime of grand larceny, an infamous crime, and neither Appellants nor Appellees make any claim that the record of such conviction has been destroyed by fire or otherwise.

In the case of *Haug v. Primeau,* 57 N.W. 25, where the person appointed was not one permitted to be appointed under the Michigan statutes the Court said at page 26:

> "the petitioner was not the grantee of the interest of the widow or mother of the deceased nor does it appear that he was requested by the next of kin, or the grantee of the interest of one or more of them to petition for administration. He was not a creditor of the estate or in any way interested in it. The petition on its face did not confer jurisdiction upon the Court to grant letters of administration to the petitioner or any other person. It follows that the order of sale of property was void."

> "Some question is raised by the defendant that the suit in equity could not be maintained as it was a collateral attack upon the proceedings. This point is not well taken. The conveyance made by the Administrator is a cloud upon Complainant's title, and she, being the owner of an undivided half interest has the right to invoke the aid of a Court of Chancery to remove the cloud."

The note in 14 A.L.R. page 619 et seq. does not sustain Appellees' contention that the appointment of a person prohibited by statute, viz., convicted of an infamous crime, is valid. On the contrary that section cites *Knox v. Noble,* 28 N.W. 355, 27 N. Y. Supp. 206, quoted in Appellants' opening brief at page 19, in which the Court said:

> "The statute expressly prohibits the granting of letters to a person convicted of an infamous crime. * * * Can it be said that the surrogate by his ipse dixit, can repeal the statute, it being manifest that the question of the eligibility of the person proposed to be appointed Administrator is not one of the jurisdictional facts? It would be a monstrous proposition to hold that a judicial officer can by his mere will override the express prohibition of the statute.
>
> "The right of the surrogate in the case at bar to appoint an administrator could not be attacked collaterally, but when he selects a person whom the statute says he shall not appoint as such administrator, after having determined to appoint such an officer, his act is absolutely void."

2 Bancroft Probate Practice Sec. 337, pp. 643-644, cited by Appellees in support of their contention, has

no application to the facts of this case. That section refers to case where there was *"merely because of some defect in the procedure,"* and not to any case where the Court *exceeded* its jurisdiction in making the appointment. (Emphasis ours.)

In conclusion, we direct the Court's attention to the fact that Appellees have not directed the attention of the Court nor counsel to any case in any jurisdiction where it has ever been held that the appointment of one, previously convicted of an infamous crime, as administrator, where such appointment is prohibited by statute, is not in excess of the jurisdiction of the Court and void.

DESCRIPTION OF PROPERTY.

ANSWERING APPELLEES' BRIEF COMMENCING ON PAGE 36.

In which it is stated that the decree of distribution and deed contain good and sufficient description of the real estate involved.

We refer the Court to the title commencing on page 48 of Appellants' brief and the authorities therein cited.

On page 37 of Appellees' brief, it is stated that the

> "Bill of Complaint fails to state a cause of action, 1. because it does not appear that Plaintiffs have any remedial interest in or claim to any property of any kind owned by Mark Hopkins."

In answer to this statement we refer the Court to par. 1, Complaint, R. 3 and Par. 20 Complaint R. 20, par. 33 of Complaint R. 27, par. 46 of Complaint, R. 34,

par. 57 of Complaint, R. 41 and par. 71 of Complaint, Sub. A. R. 46, wherein it is alleged that Plaintiffs had a remedial interest in and claim to property owned by Mark Hopkins at the time of his death.

Secondly: Insofar as the action is based on the alleged frauds perpetrated by Mary Frances Sherwood-Hopkins and Moses Hopkins, facts are alleged in the Complaint of which the Defendants had constructive notice under Sec. 1213, Civil Code, which presumption of knowledge is made conclusive and incontrovertible and there is no need of actual knowledge, 22 Cal. Jur. 616, Sec. 29, and cases cited.

Thirdly: Appellees contend that even if the Complaint showed that Plaintiffs had any interest, and even if it showed that Defendants took with knowledge of the fraud, the Complaint does not set forth facts establishing extrinsic fraud in the procurement of the decree sufficient under the decisions of the California Supreme Court or of this Court, to warrant interposition of a Court of Equity. We have fully answered this contention of Appellees under the title "Extrinsic Fraud" and need not repeat here, but refer the Court to the subject "Extrinsic Fraud" found on page 35 of Appellants' opening brief and to the same subject in this reply brief.

PARTIAL DISTRIBUTION.

Answering Appellees' claim that the decree of distribution of November 1, 1883, was a decree of final not partial distribution (p. 33, Appellees' Brief). Ap-

pellees apparently base their claim upon the provision of the omnibus clause quoted by them on page 34 of their brief, wherein the account of the administrator is settled, allowed and approved and that the residue of the estate hereinafter particularly described and any other property not now known or discovered which may belong to said estate, or in which the said estate may have any interest, be and the same is hereby distributed as follows, etc. We direct the Court's attention to the language of this omnibus clause. It does not contain the usual provisions contained in an omnibus clause, viz., "and any other property *known or unknown* or hereafter discovered which may belong to said estate." The omnibus clause in the purported decree in question only attempted to distribute "any other property *not now known or discovered,*" which may belong to said estate or in which said estate may have any interest." This clearly shows that the sum of $816.00, which was known and accounted for as shown by the purported decree of distribution was not distributed by said omnibus clause, and remained in the hands of the purported administrator. Therefore it follows that the estate of Mark Hopkins has never been fully administered and the Decree is a partial and not a final Decree of Distribution.

Since it is a partial Decree of Distribution made upon the petition of the administrator it is void, as shown by the authorities cited by Appellants' opening brief, pages 42, 43. That a Decree of Partial Distribution granted upon the petition of the Administrator, under the law in force at the time of the probating

of Mark Hopkins' estate is void, has not been challenged by learned opposing counsel.

> "It is not what the paper is named, but what it is, that fixes the character of a pleading."
>
> 21 Cal. Jur. page 58, sec. 34.

> "It is not what a pleading is called, but the facts which it sets up, that determines its character."
>
> *McDougal v. Hulett,* 64 Pac. 278 at 280; 132 Cal. 154.

> "The character of a document or of a transaction cannot be made to depend upon misnomer but it must be determined from facts."
>
> *Stephen v. Lagerovest,* 199 Pac. 52 at 54, 52 Cal. App. 519.

It is to be noted also that not only the $816.00 appearing on the face of the purported decree was not distributed, but real and personal property aggregating millions of dollars as alleged in Appellant's Complaint, was known and in the possession of the Administratrix and of the succeeding Administrator, as alleged in par. 19 sub. "G" pages 12 to 15 R. and deeds Ex. "C" and "D" pages 55 and 61 et seq. R. was not referred to nor distributed in said purported decree, and could not pass under the omnibus clause of the decree.

The Act of June 16, 1906 (Statutes 1906 Ex-Session p. 73) cited by Appellees at page 35 of their Brief has no application to the facts alleged in Plaintiffs' Complaint, it only provides a method for the restora-

tion of burned records, and Plaintiffs are not asking for the restoration of any burned or destroyed records.

VOID DEEDS AND CONVEYANCES.

Replying to Appellees point B, page 12 of Appellees' Brief, we refer to subject Void Deeds, page 24 of our opening Brief and said Deeds referred to in par. 43, 49, 50 of complaint, R. 33, 36, and 37, and the authorities therein cited, we here cite additional authorities in support of Appellants' contention that the deeds marked Ex. B, C and D set out in plaintiffs complaint 53, 55, 61 and made a part thereof were and are void.

Section 1517 Code of Civil of Procedure of California, Chapter VII, in 1879 was as follows:

> "No sale of any property of an estate of a decedent is valid unless made under order of the Probate Court, except as otherwise provided in this Chapter. All sales must be under oath reported to and confirmed by the court before the title to the property passes."

In 1880 this section was amended (1) in the first sentence substituting the word "Superior" for "Probate"; (2) in second sentence (a) changing "reported under oath" to "under oath reported to" and (b) omitting "Probate" before "Court".

C.C.P. sec. 1536:

> "When a sale of property of the estate is necessary to pay the allowance of the family, or the debts outstanding against the decedent, or the debts, expenses, or charges of administration, or

legacies, the executor or administrator may also sell any real, as well as personal property of the estate for that purpose, upon the order of the probate court; and an application for the sale of real property may also embrace the sale of personal property."

C.C.P. sec. 1524 (former section) read:

"Partnership interests or interests belonging to any estate by virtue of any partnership formerly existing, interest in personal property pledged, and choses in action, may be sold in the same manner as other personal property, when it appears to be for the best interest of the estate. Before confirming the sale of any partnership interest, whether made to the surviving partner or to any other person, the court or judge must carefully inquire into the condition of the partnership affairs, and must examine the surviving partner, if in the county and able to be present in court."

C.C.P. sec. 1525. Enacted March 11, 1872, and then read:

"If it appears that a sale is necessary for the payment of debts or the family allowance, or for the best interests of the estate and the persons interested in the property to be sold, whether it is or is not necessary to pay the debts or family allowance, the court or judge must order it to be made. In making orders and sales for the payment of debts or family allowance, the court or judge must so direct; and such articles as are not necessary for the support and subsistence of the family of the decedent, or are not specially bequeathed, must be first sold. Articles bequeathed must not be sold to pay debts or family

allowance until all other personal estate has been applied to the payment thereof."

The sections above set out were in effect during and at the times all the Deeds "Ex B, C and D" were executed and recorded and the personal property sold and included in "Ex. C" Sales of Personal Property. Sections 1522, 1523 and 1524 at that time also required confirmation by the Court.

The complaint alleges, R. 33, Par. 43, R. 36, Par. 49 and R. 37, Par. 50, that said deeds were made without any order on confirmation of the Court, and the receipts therefrom were not accounted for in the purported decree of distribution.

The deed "Ex B" was executed by Moses Hopkins and Samuel Hopkins to Mary Frances Sherwood-Hopkins while she was acting as Administratrix of the Estate of Mark Hopkins, deceased. Samuel Hopkins was not an heir and had no interest in the property of the estate of Mark Hopkins.

Deed "Ex C" was executed by Moses Hopkins, Mary Frances Sherwood-Hopkins and Samuel Hopkins to Collis P. Huntington, et al., while Mary Frances Sherwood-Hopkins was acting as Administratrix, but signed individually by her, and not as Administratrix.

Deed "Ex D" was executed by Mary Frances Sherwood-Hopkins, Samuel F. Hopkins and Moses Hopkins et al. to Ione Coal and Iron Co., during the time Mary Frances Sherwood-Hopkins was acting as Administratrix, and signed individually by her, and not as Administratrix.

Section 1576 of the Code of Civil Procedure, in effect at the time of the execution of the deed to Mary Frances Sherwood-Hopkins "Ex. B" of a ¼ of all real property belonging to the estate of Mark Hopkins was as follows:

> Enacted March 11, 1872; based on Probate Act 1851, Sec. 193, which read: "No executor or administrator shall directly or indirectly purchase any property of the estate he represented."

Section 1517 of the Code of Civil Procedure above quoted having provided that no sale of any property of an estate of a deceased person shall be valid, unless made under order of the Probate Court (or later Superior Court) the deeds set out in exhibits "B", "C" and "D" were invalid and void.

> "Sale or Deed Without Authority—Formerly, in California, no sale of any property of the estate of a decedent was valid unless made under order of the probate court, except as otherwise provided, such as in the case of sales under a power conferred by will, and no title passed until the sale was confirmed by the court. Authority for the sale or transfer of property of the estate was required to be found in the records of the court, and a sale without authority was wholly void. So also no conveyance could be made without an order of court confirming the sale and directing such conveyance. Where the administrator took no proceedings and obtained no order to convey the property, his deed was without authority and void. A representative who sold or disposed of personal property belonging to the estate, which he believed worthless, without authority,

was guilty of conversion and liable to the estate for its value with legal interest.

Under the present system, no order directing a sale is required, but, as under the former provisions, no title passes until the sale is confirmed by the court. If an executor or administrator without authority makes a deed, individually and as executor, his deed has the effect to transfer his interest as heir in the property, but the deed cannot operate to divest the rights of the other heirs. Although a conveyance under authority of special legislative act may be unavailing to transfer any title to the lands so conveyed, the deed may nevertheless be sufficient to give color of title in support of an entry on the property."

11 Cal. Juris. p. 832, sec. 494.

In *Wells Fargo & Co. v. McCarthy,* 5 Cal. App. 301, 90 Pac. 203, the Court said:

"In this connection it is contended that the allegation of the execution of the assignment by the executrix is not sufficient because such execution by the executrix in the absence of an order of confirmation conveys no title. This doctrine is clearly established and must follow from the provisions of said section 1517, Code of Civil Procedure, and it has been so declared by the Supreme Court in Horton v. Jack, 115 Cal. 29, 46 Pac. 920: 'No sale of any property of the estate of a deceased person passes any title unless it is confirmed by the probate court. Whether or not, then, this sale was in fact made to satisfy a debt of the estate, it is clear that neither the sale nor the supposed payment was sanctioned by the probate court, and that, therefore, the title to the property remained in the estate.' See also, Wick-

ersham v. Johnston, 104 Cal. 407, 38 Pac. 89, 43 Am. St. Rep. 118; Bovard v. Dickenson, 131 Cal. 162, 63 Pac. 162."

11 B *Cal. Juris.,* Sec. 684-685-686;

Huse v. Den, 54 Cal. 21;

Huse v. Den, 85 Cal. 390, 24 Pacific 790.

NOTICE TO DEFENDANTS.

As stated above and alleged in the complaint, the deed from Moses and Samuel to Mary Frances, Ex B, while Mary Frances was acting as Administratrix purporting to convey ¾ of the property of the estate was in violation of Sec. 1517 Code of Civil Procedure, above cited, also for lack of description is void, said deed being of record in all the counties where the deceased had real estate. Also the deed from Mary, Moses and Samuel to Huntington et al., Ex. C, while Mary was acting as Administratrix signed by her individually and not as Administratrix, executed April 5, 1879, (there is no authority shown on the face of the deed giving the said Administratrix authority to execute said deed; and made without an order or confirmation of the Probate Court) is void. It could convey only such interest as they had, and did not affect the interest of the other heirs at law—the grantees in said deed had notice of these facts, and the deed being on record in the counties where the property was located was and is notice to the world.

The same applies to the deed from Mary, Samuel and Moses, et al. to the Ione Coal & Iron Co. Ex "D"

executed January 16, 1880. That Huntington-Stanford and Crocker, partners and associates in business knew the facts and circumstances of the business affairs of the deceased, Mark Hopkins and knew the parties with whom they were dealing and knew or should have known the circumstances under which they were dealing with Administratrix, and had constructive notice that Mary Frances S. Hopkins was Administratrix of the Mark Hopkins estate and had no authority to sell anything belonging to the estate of Mark Hopkins, without first obtaining an order authorizing such sale and that no title passed until such sale was confirmed by the Court, and that said deeds contained no authority granting the Administratrix power to convey the property of the estate, and that the grantors could only convey such interest as they had in the property. Also the purported decree of distribution that the complaint alleged is void on its face was of record in all the counties where the deceased had real estate, and was notice to the defendants as well as their predecessors in title.

That the facts above stated and as shown by the instruments mentioned was in violation of Section 1517 of the Code of Civil Procedure above cited.

Section 1554 of the Code of Civil Procedure, in effect at the dates of said deeds, read as follows:

> "If it appears to the court that the sale was legally made and fairly conducted, and that the sum bid was not disproportionate to the value of the property sold, or if disproportionate that a greater sum, as above specified cannot be obtained, or if the advance bid mentioned in Sec.

169 of this Act, be made and accepted by the court, the court shall make an order confirming the sale and directing conveyances to be executed, and such sale, from that time, shall be confirmed and valid, and a certified copy of the order authorizing the sale, and of the order confirming the same and directing conveyances to be executed, shall be recorded in the office of the recorder of the county within which the land sold is situated."

Sec. 1555, Code of Civil Procedure, in effect at the time said deeds were executed and recorded read as follows:

"Conveyances must thereupon be executed to the purchaser by the executor or administrator, and they must refer to the orders of the probate court authorizing and confirming the sale of the property of the estate, and directing conveyances thereof to be executed, and to the record of the order of confirmation in the office of the county recorder, either by the date of such recording, or by the date, volume, and page of the record, and such reference shall have the same effect as if the orders were at large inserted in the conveyance. Conveyances so made convey all the right, title, interest, and estate of the decedent, in the premises, at the time of his death; if prior to the sale, by operation of law or otherwise, the estate has acquired any right, title, or interest in the premises, other than or in addition to that of the decedent at the time of his death, such right, title, or interest also passes by such conveyances."

The grantees in said deeds Ex "B, C and D", R. 53-55 and 61 and their grantees and successors had

notice of the invalidity of said deeds by reason of the failure of said deeds to contain the provisions required by the statute viz: The failure of said deeds to refer to the orders of the Court confirming the sale of the property of the estate, and directing conveyances thereof to be executed, and to the record of the order of confirmation in the office of the County Recorder, either by the date of such recording, or by the date, volume and page of the record. Civil Code, Sec. 19 in effect at the time said deeds were executed and recorded, read as follows:

> "Every person who has actual notice of circumstance sufficient to put a prudent man upon inquiry as to a particular fact has constructive notice of the fact itself. In all cases in which, by prosecuting such inquiry, he might have learned such facts."

Means of knowledge, especially where it consists of public records, is deemed in law to be knowledge. *Wheaton v. Nalan,* 3 Cal. App. (2d) 401, 39 P. (2d) 457; *Bowman v. Bowman,* 125 Cal. App. 602, 13 P. (2d) 1049.

The confirmation intended is such a one as is made after a return has been filed, and the parties in interest have had an opportunity to file objections and to be heard thereon. The allowance and approval of the account of the representative, charging him with money received upon the sale, do not amount to a confirmation of the sale; nor does an order in the decree of distribution to the effect that all acts and proceedings, as reported to the Court and as appear upon

the record, shall be approved and confirmed, amount to a confirmation within the meaning of the Code.

11B *Cal. Jur.* p. 147, Sec. 752;

Estate of Delaney, 49 Cal. 76 decided under the old law in force 1878.

A sale which is void cannot be confirmed. Such a sale cannot be made valid and binding by any number of so-called confirmations.

Miller v. Sup. Court, 82 Cal. App. 643, 258 P. 614.

Under former law see *Estate of Devincenzi,* 131 Cal. 452, 63 P. 723. Same case—119 Cal. 498, 51 P. 845.

11B *Cal. Jur.* p. 150, Sec. 755.

Every person is conclusively charged with notice of all parts of statutes of the State.

20 *Cal. Jur.* p. 241, Sec. 9.

Sec. 1213, Civil Code provides that every conveyance of real property acknowledged and proved and certified and recorded as prescribed by law from the time it is filed with the Recorder for record is constructive notice of its contents, to subsequent purchasers and mortgagers. The record of an instrument is constructive notice of the contents thereof to subsequent purchases and mortgages. This presumption of knowledge is conclusive and incontrovertible, and there is no need of actual knowledge.

Civil Code Sec. 18 and 19;

Fair v. Stevenot, 29 Cal. 486;

Anderson v. Wilson, 48 Cal. App. 289, 191 P. 1016.

One subsequently purchasing from vendor is not an innocent purchaser.

FACTS ALLEGED CONSTITUTE EXTRINSIC FRAUD.

Answering paragraph C, page 15, Appellees' Brief. Appellees' contention that appellants' complaint alleges fraudulent acts amounting to intrinsic fraud. We refer to the authorities heretofore cited in our opening brief, page 35 particularly to *Sohler v. Sohler,* 135 Cal. 323, 67 P. 282 cited by Appellees p. 13 of Brief as the leading case from which Appellees again cite the general rule as given by the Court, viz:

> that intrinsic fraud, fraud by which a decree or judgment is obtained by false evidence upon issues within the case is not such fraud as equity will relieve against.

All of which Appellants concede. But Appellees fail to quote or call the attention of the Court to that portion of the decision in which the Court said "But when we come to scan the allegations of this complaint, it will be discovered that there is more alleged than the mere procurement of this decree by false evidence. (See Appellant's Opening Brief, page 37.)

The Appellee from that portion of this case quoted by them apparently attempted to lead the Court to believe that the facts stated in the complaint in the *Sohler* case, above quoted, did not state facts sufficient to warrant equitable relief, that the facts alleged constituted only intrinsic fraud, but the decision of

the Court is contrary to what Appellees apparently would have the Court believe. The Court held that the facts alleged did constitute extrinsic fraud.

Appellants agree with the rule in *Gole v. Witt* quoted on p. 16 of Appellees' Brief, where Appellees state, this is the most recent decision in California on this point. However, we do not agree with them in their application of that case to the facts alleged in Appellants' complaint. Quoting from Appellees' Brief, it is stated:

> (1) "The fraud which will justify the setting aside of a final judgment by a court of equity must be of such character as prevents a trial of the issues presented to the court for determination."

With this we agree. Appellees then propound this amazing question. Now, what facts do plaintiffs allege which could possibly constitute extrinsic fraud perpetrated in procuring the decree. (See par. 15, 17 and 19 Sub. Sec. C R. 8 and 9.) In answering this question we first call the Court's attention to Sec. 1572 of the Civil Code which defines actual fraud, and particularly to subdivision three thereof, which reads as follows: "The suppression of that which is true, by one having knowledge or belief of the facts."

1. In par. 14 of the Complaint R.6, it is alleged, "that at the time of filing by Mary Frances Sherwood-Hopkins of her application for letters of administration, said applicant well knew the names and addresses of the heirs; and that said applicant willfully, knowingly and with in-

tent to defraud said lawful heirs, and to deceive the Honorable Superior Court, * * * *concealed* from said Court and from the Clerk and the Court thereof the names and addresses of the brothers and sisters of Mark Hopkins."

2. In par. 17 of the Complaint R.8 the same facts are alleged in reference to the time Moses Hopkins filed his petition for letters of administration, and that said heirs received no notice thereof directly or indirectly and never knew of said hearing.

3. Last 10 lines of par. 19 Sub. Sec. C of Complaint, R.10, it is alleged:

"Moses Hopkins, said Administrator, well knew the names of his brothers and sisters, the legal heirs of Mark Hopkins, deceased, and their Post Office addresses, and said statements and misrepresentations was a fraud upon the court and upon said heirs, conceived and perpetrated by Moses Hopkins and Mary Frances Sherwood-Hopkins who were acting in a fiduciary capacity at that time for the purpose of depriving said heirs of their rightful inheritance."

4. The reporting of property, not in existence, as assets of the estate of Mark Hopkins, deceased, and the failure to report or account for property appraised at $24,940,597.29 by appraisers appointed by the Court, par. 19 Sub. Sec. F and G R. 12, 13, 14 and 15.

5. All of par. 19 Sub. Sec. M of Complaint, commencing on p. 12, R.18 and par. 20 of the Complaint R.20.

6. All of paragraph 24 of complaint R.22.

7. All of par. 26 of Complaint, R.23 alleging the conspiracy between Mary Frances Sherwood-Hopkins, not the wife of Mark Hopkins, and Moses Hopkins.

8. All of par. 27 of Complaint, R. 24.

9. All of pars. 49 and 50 of Complaint R.36 and 37.

All of the facts alleged in the paragraphs above enumerated, are allegations of extrinsic fraud, and not allegations of intrinsic fraud, and were of such a character as prevented a trial of the issues presented to the Court for determination.

As was said in *Zaremba v. Woods,* 61 P. (2d) at p. 979:

> "Moreover, from the relations between Dr. Woods and the decedent I am further convinced that Dr. Woods knew at the time he made that statement to the clerk or stenographer of his attorney in this case, that the full brother of the decedent was living in Chicago, Illinois, and that if notice was given to him in any way of the death of his brother he would doubtless come to California and resist the probate of the will leaving all of the property to Dr. Woods, and hence that this false statement was made by Dr. Woods to the stenographer of his attorney in this case with the intent and purpose of thereby preventing the full brother of decedent from receiving notice of his death, and from having his day in Court in opposition to the probate of the aforesaid will. As a matter of law it seems to me, therefore, that Dr. Woods was guilty of extrinsic fraud upon the full brother of the decedent and upon the probate court of this state and county, and thereby prevented said full brother, the plain-

> tiff in this case, from having his day in court in opposition to the probate of said will, because, said brother did not learn about the death of his brother until after the expiration of one year after the date of probate."

We direct the Court's attention to the case of *Caldwell v. Taylor,* 218 Cal. 471, 23 Pac. (2d) 758, which we believe is the leading case in this state on what constitutes the distinction between extrinsic and intrinsic fraud, citing and quoting from the case of *U.S. v. Throckmorton,* 98 U.S. 61, 25 L. Ed. 93. Where the distinction between extrinsic and intrinsic fraud is clearly defined. The Court said:

> "The extrinsic fraud consists in the deception practiced by the successful party in keeping his opponent in ignorance of the proceeding."

"Intrinsic fraud" is mentioned as being perjured testimony given at the trial. This case also establishes the law that where extrinsic fraud is shown to exist, the successful party may be held a trustee for the benefit of those who are entitled to recover the property.

"Where the judgment or decree of the probate court is not set aside, the distribution of the property may be ordered made to those legally entitled to receive the same."

In this case Appellants are not asking for relief from any perjured testimony given at the trial, but from acts of deception practiced by Mary Frances Sherwood-Hopkins, and Moses Hopkins in keeping the Appellants and their predecessors in interest, the

heirs of Mark Hopkins in ignorance of the proceedings, and in concealing from the Court and the heirs millions of dollars worth of property belonging to the estate of Mark Hopkins, deceased.

Appellants' statement of the holding of the Court in *Wyant v. Utah Savings and Trust Co.*, 54 Utah 181, 182 P. 189 is incomplete and deceptive, in that Appellees failed to state that the Court held that the Administratrix in that case,

> "utterly failed to make and return a true and complete inventory of the property belonging to the estate. Again she converted to her own use about $12,000.00 worth of property of the estate without making an inventory thereof, and without disclosing its existence. That act alone constituted an insufferable fraud. * * * Moreover, all of her acts which resulted in despoiling respondents of their inheritance occurred during the administration of the estate, and not after the decree of distribution had been entered. * * * True, she was awarded possession and control of the property which was inventoried, and which was left for distribution, by the decree of distribution; but that decree was directly based upon *extrinsic* fraud practiced by her." (Emphasis ours.)

The statement of facts above set forth and which the Court held constituted extrinsic fraud, are almost identical with the facts alleged in Appellants' Complaint, R. 12 "G", and in Par. 19 Sub. Sec. M of Appellants' Complaint, R. 18, 19, 20.

That the agreement entered into by Moses, Samuel and Mary Frances Sherwood-Hopkins alleged in Par.

19 Sub. Sec. H, R. 15 and the decree, Ex "A" R. 52, wherein it was agreed on the 4th day of September, 1879 that upon the final settlement of *said* Estate the Court having jurisdiction thereof shall and may by its final decree distribute the entire amount of the real estate belonging to said estate to said Mary Frances Sherwood-Hopkins.

This agreement constituted extrinsic fraud, and vitiates the decree of distribution to such an extent that it is void on its face.

The real estate referred to in this agreement as belonging to the estate of Mark Hopkins, was never inventoried or accounted for in the estate, and such agreement is conclusive evidence of a conspiracy on the part of Mary Frances and Moses Hopkins to deceive the Court and to defraud the rightful heirs of their inheritance.

ALLEGATIONS IN COMPLAINT SHOW DECREE VOID ON THE FACE.

Answering Par. D pp. 25 and 26 of Appellees' Brief.

On page 26, Appellees' Brief, it states:

> "It is true that the decree does not specifically find who are the heirs, but it does purport to distribute the property to the persons which the court found entitled thereto and that is all that was then required by Sec. 1666 of the Cal. Code of Civil Procedure."

Nowhere in the decree did the Court find who was entitled to the estate of Mark Hopkins, it only found (R. 49):

"and Mrs. Mary Frances Sherwood-Hopkins, the only person interested in said estate, except said administrator, having filed her consent in writing that said account may be settled and allowed".

And on R. 59:

"and it appearing to the court that the said parties in interest, to-wit: Mary Frances Sherwood Hopkins and said Moses Hopkins have agreed in writing." (Emphasis ours.)

R. 52:

"and it further appearing to the court that the parties interested in said estate on the 4th day of September A.D. 1879 to-wit: Mary Frances Sherwood-Hopkins, Moses Hopkins and Samuel Hopkins whose interest in said estate has since been acquired by Moses Hopkins, did, on said day, enter into an agreement, in writing, wherein it was agreed among other things that upon the final settlement of said estate the court having jurisdiction thereof shall and may by its final decree distribute the entire amount of the real estate belonging to said estate to said Mary Frances Sherwood-Hopkins." * * * "It is further ordered adjudged and decreed that the entire amount of said real estate of which the said Mark Hopkins died seized and possessed, and in which the said estate has any right, title or interest, be and the same is hereby set aside and distributed to Mary Frances Sherwood Hopkins, widow of said deceased and the said conveyance from Moses Hopkins and Samuel Hopkins to

> Mary Frances Sherwood, widow of said deceased, is hereby approved and confirmed."

There is not one word in the decree of distribution in which the Court named the persons and the proportions or parts to which each was entitled under the law.

The decree of distribution is based solely upon the consent of Mary Frances Sherwood Hopkins in writing that said account may be settled and allowed (R. 49) and by the agreement in writing executed by Mary Frances Sherwood Hopkins, Moses Hopkins and Samuel Hopkins, by which they agreed that the Court may by its final decree distribute the entire amount of the real estate belonging to said estate to Mary Frances Sherwood Hopkins. There is not one word in the decree where the Court found who were the heirs entitled to the estate of Mark Hopkins, deceased. Consent of parties cannot confer jurisdiction.

Appellees cite *Miller v. Pitman,* 180 Cal. 540, 182 Pac. 50, in support of their contention. But they did not quote that portion of the opinion of the Court in that case which reads:

> "But we do not wish to be understood as holding that the plaintiffs in the presence of the potential equity of their case are without remedy. Therefore, we are constrained to say that, if time has not confirmed a wrong, the plaintiff case might very readily be made to proceed through the medium of appropriate pleadings upon the equitable theory which, while recognizing, as a matter of law, the finality of the decree as a muniment

of title in the defendant, nevertheless impresses such title with an involuntary trust in favor of the plaintiff by reason of extrinsic fraud or mistake superinduced by such fraud, in the procurement of the decree coupled with a breach of a fiduciary relationship."

Citing

Estate of Walker, 160 C. 547, 117 P. 510, 36 L.R.A. (NS) 89.

Distribution of three-fourths of the personal property and all of the real estate to Mary Frances Sherwood Hopkins was improper and in excess of the jurisdiction of the Court. Section 1402 and Section 1386 of the Civil Code in effect at the time of the death of Mark Hopkins, as quoted by Appellees is correct, and under these sections the Court had jurisdiction to distribute only one-half of the estate to Mary Frances Sherwood Hopkins, if she was the wife of Mark Hopkins at the time of his death, if the estate was separate property of deceased. The estate of a decedent vests in the heirs at the time of his death.

Section 1386 of the Civil Code as amended in 1880, quoted by Appellees on page 29 of their brief, could not under any circumstances affect the right of the heirs of Mark Hopkins, or enlarge the share of a wife whose husband died prior to the amendment of 1883, quoted by Appellees.

In re Young's Estate, 215 C. 127, 1 P. (2d) 523. *In re Rattray's Estate,* 13 C. (2d) 702, 91 P. (2d) 1042. *In re Hutman's Estate,* 219 Cal. 608, 28 P. (2d) 27.

Only one-half could have been distributed to the wife under either section quoted. The decree shows on its face that it did not distribute all the property reported in the hands of the Administrator, to-wit: $816.00 cash on hand (Par. 19, subsec. D, R. 10) and therefore was a decree of partial distribution, and it also failed to describe any of the real estate and failed to find that said property was acquired after marriage, or that it was community property and based its distribution thereof, solely on an agreement of the parties, all of which was contrary to law, and in excess of the Court's jurisdiction.

In California the presumption that all property acquired *after marriage* (except that acquired by a married woman, or by a married woman and another by an instrument in writing) is community property, is not applicable to this decree, there being no finding that it was acquired either after marriage or that it was community property.

Section 164 of Civil Code, at the time of the death of Mark Hopkins, read:

> "All other property acquired *after marriage* by either husband or wife, or both is community property".

This decree did not find that the property was acquired after their marriage, or when they were married, or that the person to whom it was distributed was married at all.

The purported decree of distribution purported to set out and describe the residue of the estate (Par.

19, Sub. Sec. "F", R. 11 of the Complaint) as the property belonging to said estate, but failed to apportion the property to the purported distributees as required by the statute.

If Mary Frances Sherwood Hopkins was the wife of the deceased she was only entitled to ½ of the estate under either Section 1402 or Section 1386, Par. 2 of the Civil Code quoted in Appellees' Brief, page 28. It is alleged in the complaint (Par. 26, R. 23) that Mary Frances Sherwood Hopkins was not the wife of Mark Hopkins, which is admitted by Appellees on this motion, but assuming that she was the wife of Mark Hopkins, as stated in the decree, then the Court exceeded its jurisdiction in distributing to her all the real property, based solely upon the agreement between Moses and Samuel Hopkins, and Mary Frances Sherwood Hopkins (R. 52), by the terms of which Moses Hopkins and Samuel Hopkins entered into an agreement, in writing, that upon the final settlement of said estate the Court shall and may by final decree distribute the entire amount of the real estate belonging to said estate to Mary Frances Sherwood Hopkins, there being no finding that either Moses Hopkins or Samuel Hopkins was an heir of Mark Hopkins.

By way of illustration, Mary Frances Sherwood Hopkins might have gone out on the highway and obtained the signature of Sam Jones and Sam Smith, strangers to the estate of Mark Hopkins, to such an agreement, and ask the Court based upon said agreement, to distribute all of the estate to her.

In the absence of a finding in the decree that Sam Jones and Sam Smith were heirs of Mark Hopkins, the decree distributing the property based upon such an agreement entered into by strangers would be void and in excess of the Court's jurisdiction.

Section 1666, Code of Civil Procedure in effect at the death of Mark Hopkins, provided:

> "In its decree the court must name the persons and the proportions or parts to which each is entitled".

This section must be read in conjunction with Sections 1402 and 1386, paragraph 2 of the Civil Code which defines the persons who are entitled to have the estate distributed to them, and in the absence of a finding in the decree of the names of the persons who are entitled to receive the estate of the deceased and the parts to which they are entitled, the decree is in excess of jurisdiction and void. It is no decree at all, it does not name the persons and proportion which Section 1666 made mandatory.

The decree is lacking in all the elements required by the statute existing at the death of Mark Hopkins, in addition it shows on its face that it did not even distribute all the property in the hands of the administrator, viz., $816.00 cash.

LACHES.

Laches does not apply to a void judgment.

Thayer v. Village of Downers Grove, 16 N. E. (2d) 715 at 719.

Appellees assert that it appears from the Bill of Complaint that the causes of complaint are stale and that Plaintiffs and their ancestors have been guilty of gross laches. (Appellees' Brief, page 5, sub-paragraph 2 and page 38 et seq.)

Appellants discussed this subject in their opening brief at pages 9 to 15 inclusive, and cited authorities which establish that the doctrine of laches has no application to the facts alleged in the various causes of action in Plaintiffs' complaint, and we will not repeat here what has been said in Appellants' opening brief. However, we desire to call the Court's attention to additional authorities on this subject.

In

Nichols v. Superior Court, 28 Pac. (2d) 714 (Cal.),

the Court there said:

> "Even as to laches, the rule, as expressed in 15 California Jurisprudence 57, is that it has no application to an attack upon a judgment void for lack of jurisdiction. And in 15 Ruling Case Law, at page 694, may be found the declaration that 'if the judgment is void on its face, it is usually held that no limitation can with propriety be interposed, for the reason that no amount of acquiescence can make such a judgment valid' ".

In *Black on Judgments,* Section 355, it is said:

> "If a judgment is absolutely void, and a mere nullity, of course it is no protection or justification to any person, and it is immaterial whether it be set aside or not."

Plaintiffs have alleged facts in the Causes of Action grounded on fraud showing that they have used due diligence and are not guilty of laches: See Complaint, Record pp. 23, 24 and 25; paragraph 19 of Complaint sub-section "M", last two paragraphs, R. pp. 19 and 20, 21 and 22.

Appellants do not question the rule stated by Appellees that

> "when the action is grounded on fraud, the Plaintiff must in his Complaint allege facts showing that he has used due diligence",

but Plaintiffs contend that in the allegations just above numbered they have fully complied with this rule.

Appellees' statement that this rule was applied by this Court in affirming the dismissal of another bill "involving the same estate and substantially the same allegations of fraud as set forth here", is not true in so far as it states that the other bill involved the same estate and substantially the same allegations of fraud as set forth here, citing *Freeman v. Hopkins,* 32 Fed. (2d) 756. We have heretofore in this brief pointed out and distinguished the facts alleged and the property involved in the case at bar are different and distinct, and do not affect the same parties and the same property as were involved in the *Freeman* case; and that the allegations of the Complaint in the *Freeman* case fail to show that the predecessors of these Plaintiffs did not know the facts constituting the fraud or were not present at the hearing, which can not be said of the complaint in this action.

Appellees have quoted *Del Campo v. Camarillo,* 154 Cal. 647 at p. 657, in which it is said

> "they must clearly show that they did not discover the existence or commission of the alleged fraud until within a reasonable time before the action was begun, that they proceed promptly upon such discovery, and that their failure to make the discovery sooner was not due to their lack of diligence. All of this must be shown, not merely by a bare statement of the conclusions as we have stated them, but by a detailed statement of the facts and circumstances which caused the ignorance, which prevented an earlier discovery and which constitute the diligence in seeking a discovery, including also a statement of all facts previously known to them tending to indicate the existence of the frauds."

Also quoting from 10 *Cal. Jur.* 55 to the same effect.

We have quoted this citation from Appellees' brief for the purpose of showing that the allegations in Plaintiffs' Complaint fully comply with every requirement therein demanded. (See R. pp. 19, 20, 21, 22, 23, 24 and 25, 29.)

Appellees contend that the statement at the end of paragraph 26 of the Complaint, viz.,

> "Mere facts were not discovered by the Plaintiffs or their predecessors, heirs of Mark Hopkins, or by any of them until September, 1945"

is not explicit and is not an allegation of the time the facts alleged in the Complaint constituting the fraud were discovered. How much more explicit could this allegation of the time when the fraud was discovered be made? It states positively that these facts (referring to the facts above stated) were not discovered

by the Plaintiffs or their predecessors, heirs of Mark Hopkins, or by any of them, until September 1945. (R. p. 24.)

We have hereinabove referred to the sections of the Complaint and the pages of the record which contain a detailed statement of the facts and circumstances which caused the ignorance, which prevented an earlier discovery, and which constitute the diligence in seeking a discovery including also a statement of all facts previously known to Plaintiffs tending to indicate the existence of fraud.

Appellees on page 42 of their brief paragraph 5, state:

> "In paragraph 29 of the Complaint it is alleged that in 1945 Plaintiffs by chance and after long research discovered the record of two deeds, one in Sacramento County and one in San Joaquin County. What the significance of these deeds may be is not disclosed."

The significance of these deeds is:

1. To show that one of the most gigantic frauds in history was perpetrated as a result of the conspiracy between Moses Hopkins, Samuel Hopkins, and Mary Frances Sherwood Hopkins by which the heirs of Mark Hopkins, other than Moses Hopkins, were deprived of their rightful inheritance.

2. To show that the rightful heirs and their descendents, the Plaintiffs herein, are the owners of 7/8 of the interest of the estate of Mark Hopkins in said real property described in said deeds, but are deprived of the possession and use thereof as the result of the

conspiracy concocted and carried out by Moses Hopkins, Samuel Hopkins and Mary Frances Sherwood Hopkins. (R. Section 48, p. 35; Sections 49 and 50, pp. 36, 37; Section 36, pp. 28, 29; Section 43, pp. 33, 34.)

Referring to page 43 of Appellees' brief relating to the affidavits filed with their motions to dismiss and the documents attached thereto referred to as "speaking" motions, we fully covered this point in our opening brief, commencing with figure 1 on page 6, to figure 2 on page 9 thereof, and we will not unnecessarily repeat the same.

The case of *Ellis v. Stevens,* 37 Fed. Supp. 488 at 490 does not support Appellees' contention that affidavits may be used as a matter of defense to the merits upon a motion to dismiss. The Court in case cited by Appellees above states: "I can agree that the allegations of the Complaint, so far as they go, must be taken as true." On the contrary, it holds as Appellants contended at the hearing of the motion, that a motion to dismiss is in the nature of a demurrer to the Complaint, the allegations of which for the purpose of the motion must be taken as true.

Neither does the case of *Gallup v. Caldwell,* 120 Fed. (2d) 90, which was a suit by stockholder against a corporation. In that case, the question determined was purely a question of law, viz.: Whether under the allegations of the complaint, to be a stockholder of the corporation it was necessary for her ownership of the stock to be registered on the books of the corporation at the time suit was instituted. The Court

held that "if record ownership is a pre-requisite to the right to bring this action, then it is expedient that the point be decided preliminarily." The decision of the District Court in that case as shown by Appellees' brief was reversed.

Appellees also quote on page 47 of their brief, from *National, etc., v. Montgomery,* 144 Fed. (2d) 528, where defendants' affidavits offered in evidence were not contradicted and their motion was denied. On appeal the United States Court of Appeals for the District of Columbia stated:

> "Even if the Complaint had stated a sufficient claim the uncontradicted affidavits of the defendants would have shown that there was no genuine issue as to any material fact."

In the case before the Court, Appellants filed affidavits contradicting the affidavits of the defendants on all material allegations in the affidavit of the defendants except that portion which referred to the earthquake and fire which occurred in San Francisco in 1906 and the loss of the public records therein. The affidavits filed by Appellants in contradiction of the affidavits filed by the Appellees raised issues of fact on the material matters alleged in the Complaint. Under the established rule as shown in Appellants' opening brief, the motion to dismiss should have been denied.

STATUTES OF LIMITATION.

Referring to page 48 et seq. of Appellees' brief wherein they cite Subdivision 4 of Section 338, Code of Civil Procedure of California, we have no dispute with Appellees as to the law stated under that heading. As herein shown, Appellants have conformed to and abided by all the rules and statutes quoted in said subdivision. However, we do direct the Court's attention to the fact that said statute does not run against a void judgment or instrument; and in an action based upon fraud, the statute does not run until three years after discovery.

Section 319, California Code of Civil Procedure, referred to by Appellees on pages 48 and 51 of their brief, has no application to the facts alleged in Appellants' complaint, for the reasons:

1. That the statute of limitations is a defensive matter and must be pleaded in the answer and cannot be raised by demurrer or by motion to dismiss unless it appears from the face of the Complaint that the action is barred by the statute pleaded.

2. Plaintiffs in paragraph 46 of their Second Cause of Action (R. p. 34) allege

> "That the heirs of Mark Hopkins as herein alleged are the lineal descendents, are the owners of 1/5 interest in and to said real estate and are tenants in common with said defendants, that Plaintiffs are the lineal descendents of the heirs of Mark Hopkins as set forth in their First Cause of Action herein."

And in their Third Cause of Action, paragraph 52 of Plaintiffs' Complaint (R. 39), after describing the property, allege:

"That upon the death of said Mark Hopkins, said brothers and sisters of said decedent succeeded to said real property as tenants in common thereof. That Plaintiffs herein are the owners as tenants in common of 7/8 interest in and to said real property above described. That in the probate proceedings had upon the estate of said Mark Hopkins, deceased, said Mary Frances Sherwood Hopkins and Moses Hopkins suppressed and concealed said property, and in the purported decree of distribution of said estate no reference is made to nor is there any record of said real or personal property herein referred to, nor to said deed herein above set forth, although the existence of said property was at all times herein mentioned, well known to said Moses Hopkins and Mary Frances Sherwood Hopkins.

That defendants as heretofore designated as being in the possession of said property owned 1/8 interest in said property and hold a 7/8 interest therein as tenants in common with Plaintiffs."

Section 321 of the California Code of Civil Procedure in force since 1872 is as follows:

"*Possession, When Presumed Occupation Deemed Under Legal Title, Unless Adverse.* In every action for the recovery of real property or the possession thereof, the person establishing a legal title to the property is presumed to have been possessed thereof within the time required by law and the occupation of the property by any other person is deemed to have been under and in subordination to the legal title, unless it appear that the property has been held and possessed adversely to such legal title for five years before the commencement of the action."

"The exclusive occupancy by a co-tenant is deemed permissive. It does not become adverse until the tenant out of possession has had either actual or constructive notice that the possession of the co-tenant is hostile to him."

West v. Evans, 175 Pac. (2d) 219 at p. 221, 29 Cal. (2d) 414;

Faubel v. McFarland, 144 Cal. 717, 78 Pac. 261.

"The recordation of a deed purporting to convey the entire property in land to a tenant in possession is not, as a matter of law and independent of any other fact, notice to his cotenant of the adverse character of the grantee's possession."

West v. Evans (supra) at page 221.

JURISDICTION OF THE FEDERAL COURT.

The Complaint states a Claim within the jurisdiction of the U. S. District Court.

Appellees contend that the District Courts of the United States are without jurisdiction over probate matters. They apparently concede that the U. S. District Court has jurisdiction to determine all other questions raised by plaintiffs' complaint. (Appellees' Brief, p. 51, et seq.)

This is a suit of a civil nature in equity between citizens of different states of which District Courts are given jurisdiction (28 U. S. Code, Chapter 2, Section 41 (1) of the Judicial Code).

Appellants concede that a Federal Court has no jurisdiction to probate a will or administer an estate; and neither the complaint nor the prayer thereof in this action asks the District Court to probate a will or administer an estate. But Federal Courts have equity jurisdiction to entertain suits in favor of legatees and heirs and creditors and other claimants against a decedent's estate to establish their claims so long as the Federal Court does not interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in the custody of the State Court. The complaint shows that there is no property in the custody of the probate court.

Markham v. Allen, 66 Supreme Court Reporter 296; 156 Fed. (2d) 653.

Waterman v. Canal-Louisiana Bank & Trust Co., 215 U.S. 33, 43, 30 S. Ct. 10, 12, 54 L. Ed. 80, and cases cited. See *Sutton v. English,* supra, 246 U.S. 205, 38 S. Ct. 256, 62 L. Ed. 664; *United States v. Bank of New York & Trust Co.,* 296 U.S. 463, 477, 56 S. Ct. 343, 347, 80 L. Ed. 331; *Commonwealth Trust Co. v. Bradford,* 297 U.S. 613, 619, 56 S. Ct. 600, 602, 80 L. Ed. 920; *United States v. Klein,* 303 U.S. 276, 58 S. Ct. 536, 82 L. Ed. 840; *Princess Lida v. Thompson,* 305 U.S. 456, 466, 59 S. Ct. 275, 280, 83 L. Ed. 285.

> While a Federal Court may not exercise its jurisdiction to disturb or affect the possession of property in the custody of a state court, it may exercise its jurisdiction to adjudicate rights in

such property where the final judgment does not undertake to interfere with the state court's possession save to the extent that the state court is bound by the judgment to recognize the right adjudicated by the federal court. Commonwealth Trust Co. v. Bradford, supra, 297 U.S. 619, 56 S. Ct. 602, 80 L. Ed. 920; United States v. Klein, supra, 303 U.S. 281, 58 S. Ct. 538, 82 L. Ed. 840, Markham v. Allen, 66 Supreme Court Reporter 296; 156 Fed. (2d) 653.

The Complaint in this action at paragraph 35 (R. p. 27) shows that on the 27th day of January, 1947, upon a petition for letters of administration upon the estate of Mark Hopkins, deceased, duly filed in the Superior Court of the State of California, in and for the City and County of San Francisco, the same being the Court having jurisdiction of said estate, refused to appoint J. T. Blount, a person duly qualified, to act as such administrator, after notice given as provided by law; and that said office of administrator of said estate is now vacant, and that there is no personal representative of said estate to bring this action.

The effect of the judgment prayed for in this action, viz., that portion of the prayer asking the District Court to direct the probate Court of the City and County of San Francisco to appoint an administrator, would be to leave undisturbed the orderly administration of Mark Hopkins' estate and to decree plaintiffs' rights in the property to be distributed after its administration. This would not be an exercise of probate jurisdiction or an interference

with property in the possession or custody of a state Court.

The mere fact that the district Court, in the exercise of the jurisdiction which Congress has conferred upon it, is required to interpret state law is not in itself a sufficient reason for withholding relief to petitioner. *Meredith v. Winter Haven,* 320 U.S. 228, 64 S. Ct. 7, 88 L. Ed. 9. *Markham v. Allen,* supra.

The prayer also prays for a judgment of the District Court decreeing

> B. That the purported decree of distribution in the estate of Mark Hopkins, deceased, herein set out in full, made on the first day of November, 1883, was obtained by extrinsic fraud practiced upon the Court and the heirs of Mark Hopkins, deceased, and for the reasons set forth in paragraph 19 of plaintiffs' First Cause of Action, and that said decree of distribution is null and void.
>
> C. That the property described in plaintiffs' complaint and not mentioned or described in said purported decree of distribution was at all times during said administration of said estate of Mark Hopkins, and at the time of the rendition of said decree of distribution known to said administrator, and that the title to said property so known to said administrator Moses Hopkins and not described in said purported final account and decree of distribution did not pass to the distributees named in said purported decree of distribution, but remained a part of the estate of Mark Hopkins undistributed.
>
> D. If this Court should find that the said decree of distribution was and is valid and in full

force and effect, then that this Court find and declare that the title to the property herein described, known to said administrator at the time of the making of said decree of distribution, but not set forth, mentioned or described therein, did not pass to the distributees named Moses Hopkins and Mary Frances Sherwood-Hopkins, or to either of them, by reason of that part of said decree purporting to distribute to said Moses Hopkins and Mary Francis Sherwood-Hopkins, "all property not now known or hereafter discovered."

E. That the Court declare and decree that the title to the property known to said administrator Moses Hopkins at the time of the entering of said decree of distribution was vested 7/8 or such interest as the record may disclose in the plaintiffs the heirs of Mark Hopkins, deceased, subject to administration.

F. That the Court direct the Superior Court of the State of California in and for the City and County of San Francisco, sitting in probate, to appoint an administrator, *de bonis non,* and to distribute the said property herein described and any other property hereinafter discovered, pursuant to the findings and judgment of this Court, to the persons determined by this Court to be the heirs of Mark Hopkins, deceased.

G. For such other relief as the Court may deem meet and equitable in the premises.

This action, therefore, being one of which the Court has jurisdiction in equity, even though the Court determines that it does not have jurisdiction to grant all the relief prayed for in plaintiffs' complaint (R.

pp. 46 to 48, inc.), then under the provision of subdivision "G" praying for such other relief as the Court may deem meet and equitable in the premises then the Court may grant such relief to which, as under all the circumstances, the complaint shows the plaintiffs are entitled.

Equity having once obtained jurisdiction of a cause, will dispose of the entire controversy under the two maxims, that "equity will not deal with a case by piecemeal" and "equity delights to do justice, and not by halves." The fact that legal questions are presented for consideration is no objection to entertaining jurisdiction of an action if the controversy be one in which a Court of equity only can afford the full relief prayed for.

Horan v. Consolidated, etc. Min. Co., 41 Cal. App. 333; 182 Pac. 813. In an action for rescission of a contract and restoration of the property sold the Court may award a money judgment for the value of the property, though not asked for by the plaintiff. *Swan v. Talbot,* 152 Cal. 142; 94 Pac. 238.

10 *Cal. Jur.,* 946, Sec. 41.

Where title to property is obtained by means of chicanery, deceit, or other variety of fraud, actual or constructive, equity, as handmaid of the law, will disregard mere forms and ascertain and act upon the substance of things. Devious and intricate methods may be employed, but the mind-searching, far-reaching vision of equity cannot be obscured by any pretense, however ingenuous, subtle, or specious it may be.

> Equity abhors fraud in all its guises, and renders abortive its shrewdest intrigues and machinations.
>
> *Sanguinetti v. Rossen,* 12 Cal. App. 623; 107 Pac. 560, 562.

We respectfully submit that the judgment dismissing this action should be reversed and the cause remanded to the District Court with instructions to deny Appellees' motion to dismiss.

Dated, San Francisco, California,
November 15, 1948.

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